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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~263~~ 73

JAMES FARR, JR., PLAINTIFF,

vs.

GEORGE A. THOMSON, ACHAS P. DUTTON, LOOMIS H. COLEMAN, NORMAN CLARKE, JOHN VAUGHAN, HOMER GLASS, IRA C. PAINE, JOHN ANDERSON, JOHN REILLEY, TITUS G. FISH, AND WILLIAM BESWICK, DEFENDANTS.

ON CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

FILED OCTOBER 4, 1869.

9.

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1 Circuit court of the United States of America for the district of Wisconsin.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district of Wisconsin, on the second Monday, being the thirteenth day, of September, A. D. 1869—present, the Honorable David Davis, associate justice of the Supreme Court of the United States, assigned to this circuit, presiding; and the Hon. Andrew G. Miller, district judge; Charles S. Hamilton, marshal; Edward Kurtz, clerk—among other, the following proceedings were had, to wit:

JAMES FARR, JR., PLAINTIFF,
vs.
GEORGE A. THOMSON, ACHAS P. DUTTON, Loomis H. Coleman, Norman Clark, John Vaughan, Homer Glass, Ira C. Paine, John Anderson, John Reilley, Titus G. Fish, & William Beswick, defendants. } At law.

Be it remembered that heretofore, to wit, on the 20th day of December, A. D. 1867, came the above-named plaintiff, by his attorney, Mr. Carpenter, and filed his præcipe for a summons against the above-named defendants as follows, to wit:

Præcipe for summons.

Circuit court of the United States of America for the district of Wisconsin.

JAMES FARR, JR.,
vs.
GEORGE A. THOMSON, ACHAS P. DUTTON, Loomis H. Coleman, Norman Clark, John Vaughan, Homer Glass, Ira C. Paine, John Anderson, John Reilley, Titus G. Fish, & William Beswick.

Issue a summons in the above-entitled cause of a plea of trespass on the case, to the plaintiff's damage fifty thousand dollars, returnable the first Monday of January next ensuing.

MATT. H. CARPENTER,
Plaintiff's Attorney.

To EDWARD KURTZ, Esq., *Clerk.*
DECEMBER 20, 1867.

& also filed bond for costs which is approved.
Whereupon a summons issued as follows:

2 THE UNITED STATES OF AMERICA, *ss:*

[SEAL] The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon George A. Thomson, Achas P. Dutton, Loomis H. Coleman, Norman Clark, John Vaughan, Homer

Glass, Ira C. Paine, John Anderson, John Reilley, Titus G. Fish, & William Beswick, to appear before the circuit court of the United States of America for the district of Wisconsin, in the seventh circuit, at the United States court room in the city of Madison, on the first Monday of January ensuing, then and there to answer unto James Farr, jr., in a plea of trespass on the case to his damage fifty thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this twentieth day of December, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the United States the ninety-second.

EDWARD KURTZ, *Clerk.*

MATT. H. CARPENTER, *Attorney.*

3 Summons returned:

"Served on the within-named George A. Thomson and Homer Glass, by leaving a copy of this summons at their usual places of abode, in presence of a member of each of their respective families, to whom I explained the contents thereof, both such persons being of suitable age and discretion; and served on the within-named Achas P. Dutton, Loomis H. Coleman, Norman Clark, John Vaughan, Ira C. Paine, John Anderson, John Reilley, Titus G. Fish, & William Beswick by showing them this summons and delivering to each of them personally a copy thereof this 23d day of December, A. D. 1867.

CASSIUS FAIRCHILD, *Marshal,*
By WM. S. JACKSON, *Deputy.*

Fees, $25 70.

4 DECEMBER 24, 1867.—This day came the plaintiff, by his attorney, and filed his declaration, to wit:

Declaration.

Circuit court of the United States for the district of Wisconsin, of the January term, A. D. 1868.

JAMES FARR, JR.,
vs.
GEORGE A. THOMSON ET ALS.

The plaintiff, James Farr, jr., a citizen of the State of Illinois—Matt. H. Carpenter, his attorney—complains against George A. Thomson, Achas P. Dutton, Loomis H. Coleman, Norman Clark, John Vaughan, Homer Glass, Ira C. Paine, John Anderson, John Reilley, Titus G. Fish, and William Beswick, each and every of whom is a citizen of the State of Wisconsin, served with process, of a plea of the case, for that, whereas—

The said plaintiff, by the consideration and judgment of this honorable court, on the 11th day of September, A. D. 1866, in a certain action in said court pending, wherein said plaintiff, then and still a citizen of the State of Illinois, was plaintiff, and the City of Racine, then and still a municipal corporation created by, and existing under, the laws of the State of Wisconsin, in said State of Wisconsin, was defendant, recovered judgment against the said City of Racine for the sum of

5 four thousand five hundred & fifty-one dollars and 29 cents, debt and damages, and the sum of fifty-nine dollars and 80 cents, costs of said suit; which judgement was duly docketed in said court on the day and year last aforesaid, as from the record thereof, now remaining in said court, will more fully appear; that said judgment still remains in full force, not reversed, nor paid or satisfied, in whole or in part.

That said judgment was rendered upon certain past due coupons, or interest warrants, before then issued by said the City of Racine, which when issued were attached to certain bonds issued by said the City of Racine, under and in pursuance of an act of the legislature of the State of Wisconsin, entitled "An act to authorize the mayor & council of the city of Racine to issue bonds to raise money for the improvement and extension of the harbor at the mouth of Root River," approved March 7, A. D. 1856; being chapter 114 of the Private & Local Laws of the State of Wisconsin, passed and enacted in A. D. 1856.

That since the 1st day of January, A. D. 1867, the said George A. Thompson, one of said defendants, has been, & still is, mayor of the city of Racine aforesaid, and since as aforesaid, all of said defendants have been, and still are, members of the common council of the said city of Racine; and have constituted, and still do constitute, said the city council of the city of Racine, and are all the members thereof.

6 That in a certain proceeding in this court pending upon the relation of said plaintiff founded on said judgment, of which proceeding said defendants had due notice, and in which proceeding said defendants appeared in said court by counsel & thus & thereby submitted themselves to the jurisdiction of said court therein, this court, on the 27th day of June, A. D. 1867, issued out of and under the seal of said court, in due form of law, a peremptory writ of mandamus, dated & tested the day & year last aforesaid, directed to "The city council of the city of Racine," in and by which said writ the said "The city council of the city of Racine" was directed (and all of said defendants as members of said city council were in effect directed) and strictly commanded and enjoined that, upon service of said writ upon "The city council of the city of Racine" aforesaid the said "The city council of the city of Racine" aforesaid should immediately levy and collect a tax upon all the taxable property of the said city of Racine sufficient to pay and satisfy said judgment and interest thereon from the day of the docketing thereof to the day of the expiration of the warrant for the collection of the said tax and costs; and do every act within the power and jurisdiction of the said "The city council of the city of Racine" to do to insure the collection of said tax with and as a part of the then next annual taxes to be raised according to law for city purposes in said city of

7 Racine, that the same might be paid over to the plaintiff in satisfaction of said judgment; that said writ was directed to the marshal of the United States for the district of Wisconsin, who was thereby commanded to serve the same upon "The city council of the city of Racine," if to be found within his district, & due return thereof make; that said writ was afterwards, and in the month of July, A. D. 1867, duly served upon the said "The city council of the city of Racine," and upon the said defendants as members thereof; and that all of the said defendants, prior to the 1st day of August, A. D. 1867, had notice of said judgment and of the cause of action upon which it was rendered, and of the issuance & service of said writ of mandamus.

That thereupon (as the said defendants, to wit, on the 25th day of July, A. D. 1867, well knew) it became and was the duty of the said

defendants, as members of the said "The city council of the city of Racine" aforesaid, to meet as such city council on or before the first Monday in August, A. D. 1867, and when so met, on or before the day & year last aforesaid and acting as the city council of the city of Racine aforesaid, to levy a tax upon all the taxable property of said city of Racine, sufficient to pay & satisfy said judgment and interest thereon from the day of the docketing thereof to the day of the expiration of the warrant for the collection of said tax, and to do every act within the power & jurisdiction of the said "The city council of the city of Racine" to do, to ensure the collection of said tax, with and as a part of the then
8 next annual taxes to be raised according to law for city purposes in said city of Racine, that the same might be paid over to said plaintiff in satisfaction of said judgment, and the plaintiff further says and avers that the taxable property of the said city of Racine now amounts, & for more than one year has amounted, to a great sum in value, to wit, more than five hundred thousand dollars, upon which, had said tax been levied by said defendants as aforesaid, the amount of the plaintiff's said judgment might & would have been collected & paid to said plaintiff.

That by law the assessment and tax list or roll for the collection of taxes in said city of Racine, for the year A. D. 1867, was required to be delivered by the city clerk of said city to the treasurer of said city for collection on or before the 1st day of September, A. D. 1867, (as the defendants before the 1st day of August, A. D. 1867, well knew,) and the same was so delivered.

That the said defendants neglecting their said official duty, as members of the said "The city council of the city of Racine" aforesaid, neglected and refused to levy or assess, on or before the 1st Monday in August, A. D. 1867, and on or before the delivery of the annual assessment & tax roll or list for the year A. D. 1867, to the treasurer of said city for collection, any tax upon the taxable property of said city
9 of Racine as they before the 1st day of August, A. D. 1867, well knew it was their duty to do, to pay and satisfy said judgment; but on the contrary thereof, after the service of said writ, and after full knowledge of the existence of said judgement and the cause of action on which the same was founded, and on or before the said 1st Monday of August, A. D. 1867, the said defendants acting as the said "The city council of the city of Racine" aforesaid, levied city taxes for other purposes upon the property of said city, but neglected and refused to levy a tax upon said property to pay said judgment, or any part thereof; whereby the said plaintiff has hitherto been and still is prevented from collecting said judgment.

Also in a further plea of the case for that whereas the said plaintiff, by the consideration and judgment of this honorable court, on the 12th day of September, A. D. 1866, in a certain other action in said court pending wherein said plaintiff, then and still a citizen of the State of Illinois was plaintiff, and the City of Racine then and still a municipal corporation created by and existing under the laws of the State of Wisconsin, in said State of Wisconsin, was defendant, recovered judgment against the said City of Racine for the sum of twenty-six thousand seven hundred and fifty-nine dolars, debt and damages; and the sum of thirty-one dollars and 30 cents, costs of said suit, which judg-
10 ment was duly docketed in said court on the day and year last aforesaid, as from the record thereof, now remaining in said court, will more fully appear; that said judgment still remains in full force, not reversed, nor paid or satisfied, in whole or in part.

That said judgment was rendered upon certain past due coupons or interest warrants before then issued by said "The city of Racine," which when issued were attached to certain bonds issued by said "The city of Racine," and upon the said bonds themselves, which had become due & payable before then, and had been issued as aforesaid, under & in pursuance of an act of the legislature of the State of Wisconsin entitled "An act to authorize the mayor & council of the city of Racine to issue bonds to raise money for the improvement and extension of the harbor at the mouth of Root River," approved March 7, A. D. 1856; being chapter 114 of the Private & Local Laws of the State of Wisconsin, passed and enacted in A. D. 1856.

That since the 1st day of January, A. D. 1867, the said George A. Thompson, one of said defendants, has been & still is mayor of the city of Racine aforesaid, and since as aforesaid, all of said defendants have been, and still are members of the common council of the said city of Racine, and have constituted, and still do constitute said "The city council of the city of Racine," and are all the members thereof.

That in a certain proceeding in this court pending upon the relation of said plaintiff founded on said judgment, of which proceeding
11 said defendants had due notice, and in which proceeding said defendants appeared in said court by counsel & thus & thereby submitted themselves to the jurisdiction of said court therein, this court, on the 27th day of June, A. D. 1867, issued out of and under the seal of said court in due form of law a peremptory writ of mandamus dated & tested the day & year last aforesaid, directed to "The city council of the city of Racine," in and by which said writ the said "The city council of the city of Racine" was directed (and all of said defendants as members of said city council were in effect directed) and strictly commanded and enjoined that, upon service of said writ upon "The city council of the city of Racine" aforesaid, the said "The city council of the city of Racine" aforesaid should immediately levy and collect a tax upon all the taxable property of the said city of Racine sufficient to pay and satisfy said judgment and interest thereon from the day of the docketing thereof to the day of the expiration of the warrant for the collection of the said tax and costs; and do every act within the power and jurisdiction of the said "The city council of the city of Racine" to do, to insure the collection of said tax with and as a part of the then next annual taxes to be raised according to law for city purposes in said city of Racine, that the same might be paid over to the plaintiff in satisfaction of said judgment. That said writ was directed to the marshal of the United States for the district of Wisconsin, who was thereby com-
12 manded to serve the same upon "The city council of the city of Racine," if to be found within his district, & due return thereof make. That said writ was afterwards, and in the month of July, A. D. 1867, duly served upon the said "The city council of the city of Racine," and upon the said defendants as members thereof; and that all of the said defendants, prior to the 1st day of August, A. D. 1867, had notice of said judgment and of the cause of action upon which it was rendered, and of the issuance & service of said writ of mandamus.

That thereupon (as the said defendants on the 25th day of July, A. D. 1867, well knew) it became and was the duty of the said defendants, as members of said "The city council of the city of Racine" aforesaid, to meet as such city council, on or before the first Monday in August, A. D. 1867, and when so met on or before the day & year last aforesaid, and acting as the city council of the city of Racine aforesaid, to levy a tax upon all the taxable property of said city of Racine, suffi-

cient to pay & satisfy said judgment and interest thereon, from the day of the docketing thereof to the day of the expiration of the warrant for the collection of said tax, and to do every act within the power & jurisdiction of the said "The city council of the city of Racine" to do, to ensure the collection of said tax with, and as a part of, the then next annual taxes to be raised, according to law, for city purposes in said city of Racine, that the same might be paid over to said plaintiff in satisfaction of said judgment. And the plaintiff further says and avers that the taxable property of the said city of Racine now
13 amounts, & for more than one year has amounted, to a great sum in value, to wit, more than five hundred thousand dollars, upon which, had said tax been levied by said defendants as aforesaid, the amount of the plaintiff's said judgment might & would have been collected & paid to said plaintiff.

That by law the assessment and tax list or roll for the collection of taxes in said city of Racine, for the year A. D. 1867, was required to be delivered by the city clerk of said city to the treasurer of said city for collection, on or before the 1st day of September, A. D. 1867, (as the defendants, before the 1st day of August, A. D. 1867, well knew,) and the same was so delivered.

That the said defendants, neglecting their said official duty as members of the said "The city council of the city of Racine" aforesaid, neglected and refused to levy or assess, on or before the 1st Monday in August, A. D. 1867, and on or before the delivery of the annual assessment & tax roll or list for the year A. D. 1867, to the treasurer of said city for collection, any tax upon the taxable property of said city of Racine, as they, before the 1st day of August, A. D. 1867, well knew it was their duty to do, to pay and satisfy said judgment; but on the contrary thereof, after the service of said writ, and after full knowledge of the existance of said judgment and the cause of action on which the same was founded, and on or before the said 1st Monday of August, A. D. 1867, the said defendants, acting as the said "The city council of
14 the city of Racine" aforesaid, levied city taxes for other purposes upon the property of said city, but neglected and refused to levy a tax upon said property to pay and satisfy said judgment or any part thereof; whereby the said plaintiff has hitherto been, and still is, prevented from collecting said judgment.

Also in a further plea of the case, for that whereas one Timothy B. Blackstone, of the city of New York, by the consideration and judgment of this honorable court, on the 21st day of April, A. D. 1864, in a certain action in said court pending, wherein said Blackstone, then and still a citizen of the State of New York, was plaintiff, and the City of Racine, then and still a municipal corporation created by, and existing under, the laws of the State of Wisconsin, in said State of Wisconsin, was defendant, recovered judgment against the said City of Racine for the sum of four thousand two hundred & fifty-five dollars and 36 cents, damages, and the sum of forty dollars and 56 cents, costs of said suit; which judgment was duly docketed in said court on the day and year last aforesaid, as from the record thereof now remaining in this honorable court will more fully appear; that said judgment still remains in full force, not reversed, nor paid or satisfied, in whole or in part. That said judgment was afterwards, to wit, on the 1st day of January,
15 A. D. 1866, assigned by said Blackstone to said plaintiff, who is now the owner thereof, & fully entitled to collect the same.

That said judgment was rendered upon certain past due coupons or interest warrants before then issued by said "The city of Racine," which

when issued were attached to certain bonds issued by said "The city of Racine," under & in pursuance of an act of the legislature of the State of Wisconsin entitled "An act to authorize the mayor & council of the city of Racine to issue bonds to raise money for the improvement and extension of the harbor at the mouth of Root River," approved March 7, A. D. 1856, being chapter 114 of the Private & Local Laws of the State of Wisconsin, passed and enacted in A. D. 1856.

That since the 1st day of January, A. D. 1867, the said George A. Thompson, one of said defendants, has been & still is mayor of the city of Racine aforesaid, and since as aforesaid, all of said defendants have been and still are members of the common council of the said city of Racine, and have constituted, and still do constitute, said "The city council of the city of Racine," and are all the members thereof.

That in a certain proceeding in this court pending upon the relation of said plaintiff as assignee of said judgment, founded on said judgment, of which proceeding said defendants had due notice, and in which proceeding said defendants appeared in said court, by counsel,
16 & thus & thereby submitted themselves to the jurisdiction of said court therein, this court, on the 27th day of June, A. D. 1867, issued out of and under the seal of said court in due form of law a peremptory writ of mandamus, dated & tested the day & year last aforesaid, directed to "The city council of the city of Racine," in and by which said writ the said "The city council of the city of Racine" was directed (and all of said defendants as members of said city council were in effect directed) and strictly commanded and enjoined that upon service of said writ upon "The city council of the city of Racine" aforesaid, the said "The city council of the city of Racine" aforesaid should immediately levy and collect a tax upon all the taxable property of the said city of Racine, sufficient to pay and satisfy said judgment and interest thereon from the day of the docketing thereof to the day of the expiration of the warrant for the collection of the said tax and costs; and do every act within the power and jurisdiction of the said "The city council of the city of Racine" to do, to ensure the collection of said tax with, and as a part of, the then next annual taxes to be raised according to law for city purposes in said city of Racine, that the same might be paid over to the plaintiff in satisfaction of said judgment.

That said writ was directed to the marshal of the United States for the district of Wisconsin, who was thereby commanded to serve
17 the same upon "The city council of the city of Racine," if to be found within his district, & due return thereof make. That said writ was afterwards, and in the month of July, A. D. 1867, duly served upon the said "The city council of the city of Racine," and upon the said defendants as members thereof; and that all of the said defendants, prior to the 1st day of August, A. D. 1867, had notice of said judgment and of the cause of action upon which it was rendered, and of the issuance & service of said writ of mandamus.

That thereupon (as the said defendants on the 25th day of July, A. D. 1867, well knew) it became and was the duty of the said defendants, as members of said "The city council of the city of Racine" aforesaid, to meet as such city council on or before the first Monday in August, A. D. 1867, and when so met on or before the day & year last aforesaid, and acting as the city council of the city of Racine aforesaid, to [to] levy a tax upon all the taxable property of said city of Racine, sufficient to pay & satisfy said judgment and interest thereon from the day of the docketing thereof to the day of the expiration of the warrant for the collection of said tax, and to do every act within the

power & jurisdiction of the said "The city council of the city of Racine," to do, to ensure the collection of said tax, with and as a part of the then next annual taxes to be raised according to law for city pur-
18 poses in said city of Racine, that the same might be paid over to said plaintiff in satisfaction of said judgment; and the plaintiff further says and avers that the taxable property of the said city of Racine now amounts, & for more than one year has amounted, to a great sum in value, to wit, more than five hundred thousand dollars, upon which, had said tax been levied by said defendants as aforesaid, the amount of the plaintiff's said judgment might & would have been collected & paid to said plaintiff.

That by law the assessment and tax list or roll for the collection of taxes in said city of Racine, for the year A. D. 1867, was required to be delivered by the city clerk of said city to the treasurer of said city for collection, on or before the 1st day of September, A. D. 1867, as the defendants, before the 1st day of August, A. D. 1867, well knew, and the same was so delivered.

That the said defendants, neglecting their said official duty as members of the said "The city council of the city of Racine" aforesaid, neglected and refused to levy or assess, on or before the 1st Monday in August, A. D. 1867, and on or before the delivery of the annual assessment & tax roll or list for the year A. D. 1867, to the treasurer of said city for collection, any tax upon the taxable property of said city of Racine, as they, before the 1st day of August, A. D. 1867, well knew it was their duty to do, to pay and satisfy said judgment; but
19 on the contrary thereof, after the service of said writ, and after full knowledge of the existence of said judgment and the cause of action on which the same was founded, and on or before the said 1st Monday of August, A. D. 1867, the said defendants, acting as the said "The city council of the City of Racine" aforesaid, levied city taxes for other purposes upon the property of said city, but neglected and refused to levy a tax upon said property to pay said judgment or any part thereof, whereby the said plaintiff has hitherto been and still is prevented from collecting said judgment.

Also in a further plea of the case, for that whereas the said plaintiff, by the consideration and judgment of this honorable court on the 11th day of September, A. D. 1866, in a certain other action in said court pending, wherein said plaintiff, then and still a citizen of the State of Illinois, was plaintiff, and the City of Racine, then and still a municipal corporation created by and existing under the laws of the State of Wisconsin, in said State of Wisconsin, was defendant, recovered judgment against the said City of Racine for the sum of four thousand five hundred & fifty-one dollars and 29 cents, debt and damages, and the sum of fifty-nine dollars and 80 cents, costs of said suit, which judgment was duly docketed in said court on the day and year last aforesaid, as from the record thereof now remaining in said court will more
20 fully appear; that said judgment still remains in full force, not reversed, nor paid or satisfied, in whole or in part.

That said judgment was rendered upon certain past due coupons or interest warrants before then issued by the said "The city of Racine," which, when issued, were attached to certain bonds issued by said "The city of Racine," under & in pursuance of an act of the legislature of the State of Wisconsin entitled "An act to authorize the mayor & council of the city of Racine to issue bonds to raise money for the improvement and extension of the harbor at the mouth of Root River," approved March 7, A. D. 1856, being chapter 114 of the Private & Local Laws of the State of Wisconsin, passed and enacted in A. D. 1856.

That since the 1st day of January, A. D. 1867, the said George A. Thompson, one of said defendants, has been and still is mayor of the city of Racine aforesaid, and since as aforesaid all of said defendants have been and still are members of the common council of the said city of Racine, and have constituted and still do constitute said "The city council of the city of Racine," and are all the members thereof.

That thereupon, as the said defendants, on the 25th day of July, A. D. 1867, well knew, it became and was the duty of the said defendants, as members of said "The city council of the city of Racine" aforesaid,
21 to meet as such city council on or before the first Monday in August, A. D. 1867, and when so met, on or before the day & year last aforesaid, and acting as "The city council of the city of Racine" aforesaid, to levy a tax upon all the taxable property of said city of Racine, sufficient to pay & satisfy said judgment and interest thereon from the day of the docketing thereof to the day of the expiration of the warrant for the collection of said tax, and to do every act within the power & jurisdiction of the said "The city council of the city of Racine" to do, to ensure the collection of said tax, with and as a part of the then next annual taxes to be raised according to law for city purposes in said city of Racine, that the same might be paid over to said plaintiff in satisfaction of said judgment, as defendants well knew; and the plaintiff further says and avers that the taxable property of the said city of Racine now amounts, & for more than one year has amounted, to a great sum in value, to wit, more than five hundred thousand dollars, upon which, had said tax been levied by said defendants as aforesaid, the amount of the plaintiff's said judgment might & would have been collected & paid to said plaintiff.

That by law the assessment and tax list or roll for the collection of taxes in said city of Racine for the year A. D. 1867, was required to be delivered by the city clerk of said city to the treasurer of said
22 city for collection on or before the 1st day of September, A. D. 1867, as the defendants, before the 1st day of August, A. D. 1867, well knew, and the same was so delivered.

That the said defendants, neglecting their said official duty as members of the said "The city council of the city of Racine" aforesaid, neglected and refused to levy or assess, on or before the 1st Monday in August, A. D. 1867, and on or before the delivery of the annual assessment & tax roll or list for the year A. D. 1867, to the treasurer of said city for collection, any tax upon the taxable property of said city of Racine, as they, before the 1st day of August, A. D. 1867, well knew it was their duty to do, to pay and satisfy said judgment; but on the contrary thereof, after the service of due notice, and after full knowledge of the existence of said judgment, and the cause of action on which the same was founded, and on or before the said 1st Monday of August, A. D. 1867, the said defendants, acting as the said "The city council of the city of Racine" aforesaid, levied city taxes for other purposes upon the property of said city, but neglected and refused to levy a tax upon said property to pay said judgment or any part thereof; whereby the said plaintiff has hitherto been and still is prevented from collecting said judgment.

Also in a further plea of the case, for that whereas the said plaintiff, by the consideration and judgment of this honorable court, on
23 the 12th day of September, A. D. 1866, in a certain other action in said court pending, wherein said plaintiff, then and still a citizen of the State of Illinois, was plaintiff, and the City of Racine, then and still a municipal corporation, created by and existing under the laws of the State of Wisconsin, in said State of Wisconsin, was defend-

ant, recovered judgment against the said City of Racine for the sum of twenty-six thousand seven hundred and fifty-nine dollars, debt and damages, and the sum of thirty-one dollars and 30 cents, costs of said suit, which judgment was duly docketed in said court on the day and year last aforesaid, as from the record thereof, now remaining in said court, will more fully appear; that said judgment still remains in full force, not reversed, nor paid or satisfied, in whole or in part.

That said judgment was rendered upon certain past due coupons or interest warrants before then issued by said "The city of Racine," which, when issued, were attached to certain bonds issued by said "The city of Racine," and upon the said bonds themselves, which had become due & payable before then, and issued as aforesaid, under & in pursuance of an act of the legislature of the State of Wisconsin entitled "An act to authorize the mayor & council of the city of Racine to issue bonds to raise money for the improvement and extension of the harbor at
24 the mouth of Root River," approved March 7, A. D. 1856, being chapter 114 of the Private & Local Laws of the State of Wisconsin, passed and enacted in A. D. 1856.

That since the 1st day of January, A. D. 1867, the said George A. Thompson, one of said defendants, has been, & still is, mayor of the city of Racine aforesaid, and since as aforesaid, all of said defendants have been, and still are, members of the common council of the said city of Racine, and have constituted, and still do constitute, said "The city council of the city of Racine," and are all the members thereof.

That thereupon, as the said defendants, on the 25th day of July, A. D. 1867, well knew, it became and was the duty of the said defendants, as members of said "The city council of the city of Racine" aforesaid, to meet as such city council on or before the first Monday in August, A. D. 1867, and when so met, on or before the day & year last aforesaid, and acting as the city council of the city of Racine aforesaid, to levy a tax upon all the taxable property of said city of Racine, sufficient to pay & satisfy said judgment, and interest thereon, from the day of the docketing thereof to the day of the expiration of the warrant for the collection of said tax, and to do every act within the power
25 & jurisdiction of the said "The city council of the city of Racine" to do, to ensure the collection of said tax with, and as a part of, the then next annual taxes to be raised according to law for city purposes in said city of Racine, that the same might be paid over to said plaintiff, in satisfaction of said judgment, as defendants well knew; and the plaintiff further says and avers that the taxable property of the said city of Racine now amounts, & for more than one year has amounted, to a great sum in value, to wit, more than five hundred thousand dollars, upon which, had said tax been levied by said defendants as aforesaid, the amount of the plaintiff's said judgment might & would have been collected, & paid to said plaintiff.

That by law the assessment and tax list or roll for the collection of taxes in said city of Racine, for the year A. D. 1867, was required to be delivered by the city clerk of said city to the treasurer of said city for collection, on or before the 1st day of September, A. D. 1867, as the defendants, before the 1st day of August, A. D. 1867, well knew, and the same was so delivered.

That the said defendants, neglecting their said official duty as
26 members of the said "The city council of the city of Racine" aforesaid, neglected and refused to levy or assess, on or before the 1st Monday in August, A. D. 1867, and on or before the delivery of the annual assessment & tax roll or list for the year A. D. 1867, to the

treasurer of said city, for collection, any tax upon the taxable property of said city of Racine, as they, before the 1st day of August, A. D. 1867, well knew it was their duty to do, to pay & satisfy said judgment; but on the contrary thereof, after full knowledge of the existence of said judgment, and the cause of action on which the same was founded, and on or before the said 1st Monday of August, A. D. 1867, the said defendants, acting as the said "The city council of the city of Racine" aforesaid, levied city taxes for other purposes upon the property of said city, but neglected and refused to levy a tax upon said property to pay said judgment or any part thereof, whereby the said plaintiff has hitherto been, and still is, prevented from collecting said judgment.

Also in a further plea of the case, for that whereas one Timothy B. Blackstone, of the city of New York, by the consideration and judgment of this honorable court, on the 21st day of April, A. D. 1864, in a certain other action in said court pending, wherein said Blackstone, then and still a citizen of the State of New York, was plaintiff,
27 and the City of Racine then, and still, a municipal corporation, created by, and existing under, the laws of the State of Wisconsin, in said State of Wisconsin, was defendant, recovered judgment against the said City of Racine for the sum of four thousand two hundred & fifty-five dollars and 36 cents, damages, and the sum of forty dollars and 56 cents, costs of said suit, which judgment was duly docketed in said court on the day and year last aforesaid, as from the record thereof now remaining in this honorable court will more fully appear; that said judgment still remains in full force, not reversed, nor paid or satisfied, in whole or in part. That said judgment was afterwards, to wit, on the 1st day of January, A. D. 1866, assigned by said Blackstone to said plaintiff, who is now the owner thereof, & fully entitled to collect the same.

That said judgment was rendered upon certain past due coupons, or interest warrants, before then issued by said "The city of Racine," which, when issued, were attached to certain bonds issued by said "The city of Racine," under & in pursuance of an act of the legislature of the State of Wisconsin entitled "An act to authorize the mayor & council of the city of Racine to issue bonds to raise money for the improvement and extension of the harbor at the mouth of Root River," approved March 7, 1866, being chapter 114 of the Private & Local Laws of the
28 State of Wisconsin, passed and enacted in A. D. 1856.

That since the 1st day of January, A. D. 1867, the said George A. Thompson, one of said defendants, has been & still is mayor of the city of Racine aforesaid, and since as aforesaid, all of said defendants have been and still are members of the common council of the said city of Racine, and have constituted and still do constitute said "The city council of the city of Racine," and are all the members thereof.

That thereupon, as the said defendants, on the 25th day of July, A. D. 1867, well knew, it became and was the duty of the said defendants, as members of the said "The city council of the city of Racine" aforesaid, to meet as such city council on or before the first Monday of August, A. D. 1867, and when so met on or before the day & year last aforesaid, and acting as the city council of the city of Racine aforesaid, to levy a tax upon all the taxable property of said city of Racine, sufficient to pay & satisfy said judgment and interest thereon, from the day of the docketing thereof to the day of the expiration of the warrant for the collection of said tax, and to do every act within the power & jurisdiction of the said "The city council of the city of Racine" to do, to insure the collection of said tax, with and as a part of the then next annual taxes to be raised

according to law for city purposes in said city of Racine, that the same might be paid over to said plaintiff in satisfaction of said judg-
29 ment as defendants well knew; and the plaintiff further says and avers that the taxable property of the said city of Racine now amounts, & for more than one year has amounted, to a great sum in value, to wit, more than five hundred thousand dollars, upon which, had said tax been levied by said defendants as aforesaid, the amount of the plaintiff's said judgment might & would have been collected & paid to said plaintiff.

That by law the assessment and tax list or roll for the collection of taxes in said city of Racine, for the year A. D. 1867, was required to be delivered by the city clerk of said city to the treasurer of said city for collection, on or before the 1st day of September, A. D. 1867, as the defendants, before the 1st day of August, A. D. 1867, well knew, and the same was so delivered.

That the said defendants, neglecting their said official duty as members of the said "The city council of the city of Racine" aforesaid, neglected and refused to levy or assess, on or before the 1st Monday in August, A. D. 1867, and on or before the delivery of the annual assessment & tax roll or list for the year A. D. 1867, to the treasurer of said city for collection, any tax upon the taxable property of said city of Racine, as they, before the 1st day of August, A. D. 1867, well knew it was their duty to do, to pay & satisfy said judgment; but on the con-
30 trary thereof, after due notice, and after full knowledge of the existence of said judgment, and the cause of action on which the same was founded, and on or before the said 1st Monday of August, A. D. 1867, the said defendants acting as the said "The city council of the city of Racine" aforesaid, levied city taxes for other purposes upon the property of said city but neglected and refused to levy a tax upon said property to pay said judgment or any part thereof, whereby the said plaintiff has hitherto been, and still is, prevented from collecting said judgment, to the damage of the plaintiff of fifty thousand dollars; to recover which, with just costs, he brings suit.

MATT. H. CARPENTER,
Attorney for Plaintiff.

31 JANUARY 13, 1868.—This day came the defendants, by their attorneys, Messrs. John W. & A. L. Cary, and filed their demurrer as follows:

Demurrer.

Circuit court of the United States for the district of Wisconsin.—Of the first Monday of January, A. D. 1868.

GEORGE A. THOMSON, ACHAS P. DUTTON, LOOMIS H. Coleman, Norman Clark, John Vaughn, Homer Glass, Ira C. Paine, John Anderson, John Reilley, Titus G. Fish, and William Beswick
ads.
JAMES FARR, JR.

And the said defendants, by John W. & A. L. Cary, their attorneys, come and defend the wrong and injury, when, &c., and say that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law for the

said plaintiff to have or maintain his aforesaid action thereof against the said defendants, and they, the said defendants, are not bound by law to answer the same, and this they are ready to verify; wherefore, by reason of the insufficiency of the said declaration in this behalf, the said defendants pray judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against them, &c.

JOHN W. & A. L. CARY,
Defendants' Att'ys.

32 We hereby certify that, in our opinion, the above demurrer is well founded in point of law.

JOHN W. & A. L. CARY,
Defendants' Att'ys.

FEBRUARY 7, 1868.—This day came the plaintiff, by his attorney, & filed his joinder in demurrer as follows:

Joinder.

Circuit court of the United States for the district of Wisconsin.

JAMES FARR, JR.,
vs.
GEORGE A. THOMPSON & OTHERS.

And here comes the said plaintiff, by his said attorney, and saith that the said declaration, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law for him, the said plaintiff, to have and maintain his aforesaid action thereof against the said defendants, and the said plaintiff is ready to verify & prove the same as the court here shall direct & award; wherefore, inasmuch as the said defendants have not answered the said declaration, nor hitherto in any manner denied the same, the said prays judgment, & his damages for the said several wrongs in the said declaration mentioned.

MAT. H. CARPENTER,
Attorney for Plaintiff.

33 And afterwards, to wit, at a term of said court begun and held according to law at the city of Milwaukee, on the second Monday of September, A. D. 1868, and on the sixth day thereof, to wit, on the 19th day of September, A. D. 1868—present and presiding, the Honorable David Davis, associate justice of the Supreme Court of the United States, assigned to this circuit, and the Honorable Andrew G. Miller, district judge—the following proceedings were had, to wit:

Hearing demurrer argued, &c.

JAMES FARR, JR.,
vs.
GEORGE A. THOMSON, ACHAS P. DUTTON, Loomis H. Coleman, Norman Clark, John Vaughan, Homer Glass, Ira C. Paine, et als. } At law.

This day came the parties, by their counsel, and the demurrer of the

defendants to the plaintiff's declaration came on to be heard, and was argued by Mr. Carpenter for the plaintiff and by Mr. Cary for the defendants, when the court took the same under advisement.

And now, at this same term, to wit, September term, 1869, and on the sixth day thereof, to wit, on the 18th day of September, A. D. 1869—present and presiding, the Honorable David Davis, associate justice of the Supreme Court of the United States, and the Honorable
34 Andrew G. Miller, district judge—the following proceedings were had, to wit:

JAMES FARR, JR.,
vs.
GEORGE A. THOMSON ET ALS. } At law.

This day came the parties, by their counsel. On consideration of the demurrer to the declaration in this cause, the judges being divided in opinion as to whether said declaration shows a legal cause of action against the defendants, signed and filed a certifiate of such division of opinion, and ordered the same to be certified to the Supreme Court of the United States; which certificate is as follows, to wit:

Certificate of division of opinion.

Circuit court of the United States for the district of Wisconsin.

JAMES FARR, JR.,
vs.
GEORGE A. THOMSON, ACHAS P. DUTTON, Loomis H. Coleman, Norman Clark, John Vaughan, Homer Glass, Ira C. Paine, John Anderson, John Reiley, Titus G. Fish, & William Beswick.

The demurrer to the declaration in this cause having been argued and submitted to the court, and the judges of said court being divided in opinion upon the following question, viz:

Whether the declaration in this cause shows a legal cause of
35 action against the defendants therein named—

We, the judges of said court, hereby certify said question to the Supreme Court of the United States, according to the act of Congress in such case made & provided.

Dated September 18, 1869.

DAVID DAVIS.
A. G. MILLER.

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, Edward Kurtz, clerk of the circuit court of the United States of America for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court at the city of Milwaukee, in said district of Wisconsin, this thirtieth day of September, in the year of our Lord one

thousand eight hundred and sixty-nine, and of the independence of the said United States the ninety-fourth.

[SEAL.] EDWARD KURTZ, *Clerk.*

(Indorsement on record:) Wisconsin C. C. U. S. No. 263. James Farr, jr., plaintiff, vs. George A. Thomson, Achas P. Dutton, L. H. Coleman, Norman Clarke, et al.

Filed 4th October, 1869.

SUPREME COURT, UNITED STATES,

No.—— DEC. TERM, 1870.

JAMES FARR, Jr.,

vs.

GEORGE A. THOMPSON, and others.

BRIEF FOR PLAINTIFF.

MATT. H. CARPENTER,
of Counsel.

J. H. Yewdale, Law Printer, cor. Huron and East Water St., Milwaukee.

Supreme Court of the United States.

No. *December Term, 1870.*

JAMES FARR. JR.,

vs.

GEORGE A. THOMPSON, and others.

This case is certified to this Court on account of difference of opinion of the Judges of the Circuit Court of the United States, for the District of Wisconsin, stated in the record as follows: "Whether the declaration shows a legal cause of action."

The declaration alleges that the plaintiff recovered certain judgments against the City of Racine, upon the bonds and coupons, issued by the city to build the harbor at Racine, under and in pursuance of special authority granted by the Legislature of the State of Wisconsin, being Chap. 114, Pr. Laws, 1856. That after judgments were obtained, the plaintiff procured from the Circuit Court a writ of *mandamus* on each judgment, commanding the city counsel of the City of Racine to levy a tax to pay the judgments; that the writs were duly served on the defendants—members of said council—in July,

1867 ; and that it thereupon became and was the duty of the defendants, in obedience to said writs to levy the tax on or before the 1st day of August, 1867. That the defendants neglected and refused to perform this duty ; and that in consequence of such neglect the plaintiff was prevented from having the tax levied and collected with the other taxes, for city purposes, in the fall of 1867.

The declaration also alleges, that the said city council had never levied any tax to pay said judgment, prior to August 1, 1867.

The demurrer, of course, admits all these allegations to be true ; and the question is, *can the plaintiff maintain an action against the defendants, for their official neglect in the premises ?*

I.

It is a universal principle of the common law ; a principle to which there is no exception, that where any officer neglects to perform a plain duty imposed by law, and one as to the performance of which, *no discretion is left to the officer*, any person injured by such neglect may have his action. The cases most common in the books, are against sheriffs and constables as ministerial officers of the law ; but all such cases rests upon the general principle above stated ; and are merely illustrating instances of the general principle which applies to *all officers*, and to all persons upon whom the law imposes a specific duty, whether officers or not.

Commyns Dig. Vol. 1, page 292, 293, says :

Thus it has been held that action lies against him, "who neglects to do that which by law he ought to do ;

" as, if a man is bound by prescription to pay toll, and " refuses the payment. I Rol. 103. Or to provide beer " for the beadle of the hundred, and does not do it. 1 " Rol. 106.

" So, if the parson is bound by prescription to find a " bull, and a boar, yearly, for the increase of the cattle " within his parish, and does not do it. 1 Rol. 109. 4 " Mod. 241. Cro. Eliz. 569.

" So if a man be bound by prescription to grind at a " mill, all grain *triturat* spent in his house in the same " town, do not grind there. 2 Sand. 116. 2 Bull. 196. " 1 Vent. 167.

" So if a man, bound by prescription to repair fences " against another, does not do it; whereby the cattle of " the other perish. 1 Vent. 265.

" So if bound to the repair of a bridge, by the neglect " whereof A. has special damage.

Against persons in office, Com. Dig., page 291.

Action " lies against an officer for neglect of the duty " of his office; as, if a Sheriff do not return a writ. 1 " Rol. 93.

" So, if an officer, whose business it is, refuses to en- " roll a deed within six months.

" If an arch deacon do not induct a clerk admitted and " instituted.

" So, if a mayor at the election of a bridge master re- " fuse a poll, which is usual, and return another " elected.

" If a lord in ancient *demesne* refuse to hold his Court.

" So, *in every case*, where an officer is entrusted by the " common law, or by statute, an action lies against him

"*for a neglect of the duty of his office. Holt J.* 1 *Salk* 18."

This well established principle of the ancient common law has never been questioned in a single case that I am aware of, in the modern reports; but on the contrary is recognized and enforced in a great variety of instances by the English and American Courts; and no case it is believed gives the slightest countenance to the argument of the opposite counsel, that this principle is limited to ministerial officers, executing legal process. Such officers are liable; but their liability rests upon the general principle that *all* officers, and *all persons*, are liable for damages resulting from their neglect to perform a duty imposed by the common law, or by statute.

The only exception to the general principle that all officers are liable for neglect to perform official duty, is, that where the duty is in its nature judicial, and the officer is clothed with a legal discretion as to the performance of the duty, there he is not liable to civil action.

In *Wilson vs. The Mayor of New York*, 1 Denio, 595. The Court say:

"Public officers, of every grade and description, may "be impeached or indicted for official misconduct and cor- "ruption. To this there is no exception from the highest "to the lowest. But the civil remedy for misconduct in "office is more restricted, and depends exclusively upon "the nature of the duty which has been violated. "Where that is absolutely certain and imperative, and "every mere ministerial duty is so, the delinquent officer "is bound to make full redress to every person who has "suffered by such delinquency. *Duties which are purely* "*ministerial in their nature, are sometimes cast upon officers*

" *whose chief functions are judicial.* Where this occurs, and " the ministerial duty is violated, *the officer although, for* " *most purposes a judge, is still civily responsible for such mis-* " *conduct.*

" But where the duty alleged to have been violated is " purely judicial, a different rule prevails ; for no action " lies in any case, for misconduct or delinquencies, how- " ever gross in the performance of judicial duties, and " although the officer may not in strictness be a judge, " still, if his powers are discretionery to be exerted or " withheld, according to his own view of what is neces- " sary and proper, they are in their nature judicial, and " he is exempt from all responsibility by action, for the " motives, which influence him, and the manner in which " such duties are performed. If corrupt, he may be im- " peached or indicted, but the law will not tolorate an " action to redress the individual wrong which may have " been done."

In Rochester Co. v. Rochester City, 3 *Comstock*, 466, the Court say :

" A good deal of obscurity has, in times past, rested " upon this subject, arising from the incident that some " duties of such corporations are judicial in their nature, " while others purely ministerial have to be executed by " them ; and these duties sometimes so mingle as not to " be easily distinguished from each other.

" Whenever duties of a judicial nature are imposed " upon a public officer, the due execution of which de- " pends upon his own judgment, he is exempt from all " responsibility by action, for the motives which influ-

" ence him, and the manner in which such duties are " performed. If corrupt, he may be impeached or in- " dicted ; but he cannot be prosecuted by an individual " to obtain redress for the wrong which he may have " done.

" *But this judicial immunity can be extended no further.* " The civil remedy depends exclusively upon the nature " of the duty which has been violated.

" *When duties which are purely ministerial are cast upon of-* " *ficers whose chief functions are judicial and the ministerial* " *duty is violated, the officer although for most purposes a* " *judge, is still civilly responsible for such misconduct.* Wil- " son vs. the Mayor of New York, 1 Denio 509.

" The Charter of the City of Rochester confers upon " the Common Coun cil ' power to cause common sewers, " drains, vaults and bridges to be made in any part of " the City.' The ordinance of the Common Council di- " rec tin g such public improvments is judicial in its na- " ture, and extends immunity from private action for " damages to those who perform the duty."

" *But there this immnnity ends. The further prosecution* " *of the work is purely of a ministerial character, the agents to* " *perform it are of their own selection, and they are bound to* " *see that it is done in a safe and skillful manner.*"

Adsit vs Brady 4 *Hill*, 630, was an action against the Superintendent of the Erie Canal for neglect of duty imposed by the statute ; and the Court by Bronson, C. J say :

" When an individual sustains an injury by the misfea- " sance or nonfeasance of a *public officer*, who acts, or " *omits to act* contrary to his duty, the law gives redress

" to the injured party by an action adapted to the nature " of the case. *This principle is so well settled that it is only " necessary to inquire whether there be anything in this case to " take it out of the operation of the general rule.*"

Defendant was held liable.

This principle is recognized in various decisions of this Court, and the same distinction made between acts ministerial in their nature, and those, as to the performance of which, the officer has a discretion.

Tracy vs. Swartwout, 10 *Pet.* 94.
Mason v. Fearson, 9 *How*, 259.

In Boyden v. Burke 14 *How*, 575, this court held that an action could be maintained against the Commissioner of Patents for refusing to deliver a copy of a record in his office to a person entitled to demand the same, and the Court say :

" Where there is a right on the one side, and a cor. " responding duty on the other, a refusal to perform such " duty, on the reasonable request of the party entitled " to demand it, *will subject the officer to an action.*"

See also to the effect that this action can be maintained against every officer neglecting a clear duty imposed by law :

Schinotti v. Bumpsted, 6 *T. R.* 646.
Mercy Docks v. Penhallow, 7 *H. & N.*, 329.
Lincoln v. Hapgood, 11 *Mass*, 350.
Stone v. Augusta, 46 *Maine*, 127.

II

It only remains to consider whether the duty which the defendants refused to perform was ministerial, or whether the defendants were clothed with a judicial discretion in the premises, and had the right to determine whether a tax should be levied or not. And here the case may be considered, first: in regard to the duty of the defendants as fixed by law ; and second, as to their duty after a writ of *mandamus* had been issued and served, commanding them to levy this tax.

1. The *mandamus* may be thrown out of account entirely ; and yet the duty of the defendants to levy this tax was clear and imperative ; so that they would be liable to this action for neglecting to perform the duty.

The act under which these bonds were issued provides :

"Sec. 5. *It shall be the duty of the city council,* and said "council is hereby authorized and empowered to *provide* "*for the payment of the interest* and principal *as the same* "*shall become due,* of any and all bonds which shall be is- "sued under and by virtue of this act, *and for that pur-* "*pose said city council may levy a tax from time to time suf-* "*cient to pay the same* on the taxable property of the city "of Racine."

Not even a demand on the defendants to levy the tax was necessary.

The law made it the duty of the council to levy the tax, not *on demand of a bondholder,* but to levy "from time to time sufficient to pay" the interest *as it should mature.* The issuance of the bonds by the council, was

notice *to that body* of the times when interest became due on said bonds. The duty to levy the tax was perfect when an installment of interest became due ; this duty was imperatively enjoined by law. If the council would not obey the law, is it probable they would have paid greater heed to a demand of the plaintiffs ?

In Com. vs. Council Pittsburg, 34 *Penn.* 512. The objection that demand must be made before *mandamus* could issue was overruled under similar circumstances, the Court saying, " The law never requires a vain thing. " * * " Anything which shows that the defend- " ant *does not intend* to perform the duty *is sufficient to* " *warrant the issue of a mandamus.*"

See also *Regina vs. Kendall* 1 *Ad. and El. N. S.* 386. *note.*

King vs. E. Ind. Co. 4 *A. and Ad.* 530.

In Graham vs. Maysville, 6 Am. Law Reg. 625, the court overruling the same objection, say :

" It will not do for the defendants to say there has " been no refusal to levy. They have refused, or, at " least, *have failed to levy.*. They have not collected the " money or paid the interest, and the object of this pro- " ceeding is to require them to do it, * * They do " not array themselves against the authorities of the " country and say they will not levy the tax if required ; " but they certainly *have manifested an intention not to do* " *it, until they shall be required.* This proceeding is intended " to operate upon the council. The writ would be di- " rected to the council. The council is a perpetual body " though its members may change ; and that body being

"the authority required by law to make this levy *has* "*been in default* as to the performance of this duty since a "proper period for a levy in 1857."

The Supreme Court of Wisconsin, in *Farr vs. the City Council of Racine*, 22 *Wis.*, 258 have settled this precise question *between these parties*. Application for *mandamus* was made by *Farr* on a judgment rendered in the State Court on other coupons of this issue of bonds, which was resisted by *these defendants* upon the ground that no demand to levy the tax had been made upon them. The Court overruled this objection and awarded the writ. The court say:

"There can be no question as to the right of a judg- "ment creditor in a case like this to the writ of *manda-* "*mus*, to compel the city council to levy a tax to pay the "judgment, provided an application sufficient in form is "made. This application seems to us sufficient. The "only objections made or suggested are: 1st. That a "demand on the city council to levy the tax is necessary "before a *mandamus* can go; and 2d. That it is not "shown by the affidavit that the relator is the owner of "the judgment.

"A demand is clearly unnecessary, because it is made "the duty of the city council without it, from time to "time to levy a tax sufficient to pay the interest and "principal of the bonds upon which the judgment was "rendered as the same shall become due. Pr. Laws, 1856 "C. 114, S. 5 If the act had required the council to do "so upon the demand of any person interested, then a de- "mand would have been necessary, but not otherwise."

2. But in this case, not only was the duty of the defendants clear by law, to levy a tax to pay these judgments, even without a demand; but demand had been made, proceedings instituted and a *mandamus* issued by this court, strictly and peremptorily commanding the defendants to levy this tax, so that it might be collected with and as a part of the tax to be raised for city purposes in 1867.

It is idle to maintain that after the issuance of the writ of *mandamus*, these defendants had any discretion as to whether or not a tax should be levied. No such discretion existed, because: (1.) By law they were commanded to raise money by taxation, from time to time, to pay the interest on these bonds and the principal sum when it should mature; and (2) they had been commanded by *mandamus* to perform this clear, plain, imperative duty. And upon this point I have an authority which must be considered as conclusive.

In Kendall vs. Stokes 3 *How.*, 98. the decision of the house of Lords, in 9 Clark and Finnelly, 251, is thus commented on by Cheif Justice Tany, in delivering the opinion of the Court; "Upon an examina-
"tion of thatcase it will be found that it had been
"decided by the Court of Session, in Scotland, in a
"former suit between the same parties, that the act
"complained of was a mere ministerial act which the
"party was bound to perform; and that this judgment
"had been affirmed in the house of Lords. And the
"action against the party, for refusing to do the act, was
"maintained, not upon the ground only that it was min-

"isterial, *but because it had been decided to be such by the* "*highest judicial tribunal known to the laws of Great Britain.* "The refusal for which the suit was brought took place "*after this decision*, and the learned lords by whom the "case was decided, held that the act of refusal, under such "circumstances, *was to be regarded as wilful and with knowl-* "*edge*; that the refusal to obey the lawful decree of a "Court of justice, *was a wrong for which the party who had* "*sustained injury by it, might maintain an action, and recover* "*damages against the wrongdoer.*"

This decision is decisive of the point under consideration. The peremptory writ of *mandamus* was conclusive of the nature of the duty to be performed; because such writ only issues to compel the performance of a ministerial duty. The subsequent refusal of the defendants to levy the tax, was therefore, not only a breach of the duty enjoined upon them by law, which of itself would have given the plaintiff the right to maintain this action, but it was a contemptuous wilful refusal after the writ had been served upon them. They can no longer claim or pretend that they were even mistaken as to their duty; or that they acted in good faith, in neglecting to levy the tax.

III.

Inasmuch as the jurisdiction of the Circuit Court is limited to causes in which the matter in controversy exceeds five hundred dollars; it may be material to consider the rule of damages in this case; because if, as will be contended, the plaintiff can only recover nominal

damages, if entitled to recover at all, then the record might be held to show a case not within the jurisdiction of that Court; and it will doubtless, save a second writ of error in this cause, to have rule of damages determined upon this hearing.

This proceeding by *mandamus* to compel the defendants to perform the duty of levying a tax to satisfy these judgments, under our practice takes the place of an execution on the judgments. The defendants should be considered as standing in the shoes of ministerial officers, Sheriffs, &c., in other cases, executing process to realize the amount of the judgment.

The rule is well settled, that a sheriff who makes default in the execution of final process is liable to an action; and the measure of damages, is the amount of the judgment; *unless he can show that the judgment debtor was insolvent.*

Powell vs. Hord, 1 *Strange* 650.
Hall vs. Brooks, 8 *Vt.* 485.
Goodrich vs. Starr, 18 *Vt.* 227.
Wolfe vs. Davidson, 5 *Mod.* 202.
Cook vs. Champreys, 2 *Strange* 901.
Kellogg vs. Manro, 9 *John.* 300.

The sheriff is not permitted to show in mitigation of damages, that the judgment debtor *is responsible, and therefore that the judgment can still be collected.*

Evans vs. Govenor, 18 *Ala.* 659.

In Ledyard vs. Jones, 3 *Seld*, 550, the Court overruling

the argument, that if the judgment debtor was responsible, the plaintiff was entitled to only nominal damages, say :

" According to this construction if the officer is sued for " a neglect of duty, he can say, the defendant in the ex- " ecution had no property out of which he could collect " the money. And that it is conceded is a good defence, " or he can say he has property out of which he can still " collect it, and therefore nothing but nominal damages " can be recovered against me, which can only be the " damages the plaintiff has sustained by the delay in col- " lecting the money, simply the interest upon the inter- " est of the money due, when it ought to have been col- " lected. *To such a doctrine I can never yield my assent* ; " *for a plaintiff, if this is tolerated might never be able to* " *collect his debt. The second execution issued upon the same* " *judgment would admit of the same defence, and so on, as often* " *as they might be issued, provided the judgment debtor did* " *not in the meantime get rid of his property.*"

The same principal is clearly applicable here. If these defendants for their neglect to levy this tax, may answer that the city is perfectly responsible, and any other council may levy the tax ; so may the next, and all succeeding councils say the same thing ; and the plaintiff will never be able to realize his judgment.

The plaintiff held certain judgments against the city, the defendants were bound by law, and by the *mandamus* of the court, to levy the tax so it could be collected with the taxes of 1867. This duty the defendants refused to perform ; and in consequence of their refusal the plain-

tiff has been prevented from receiving his money. The rule of damages should be the amount he would have received if the defendants had done their duty, viz.: the full amount of his judgments, interest and costs. Any other rule of damages would leave the plaintiff remediless. Because every succeeding council for a hundred years, may commit the same neglect of duty, and still excuse themselves upon the ground that the next council could perform the duty. It is of no consequence who may or may not perform this duty. The defendants whose duty it was, have refused; and they are liable. We need look no further.

2. The rule is well settled that a ministerial officer acting in good faith, and without malice, is liable only to the amount of actual injury inflicted by his erroneous acts; that is, he is not answerable for *vindictive* or *punitory* damages. But this exemption is confined to those cases where he has acted in good faith, and from ignorance of his duty.

Joyal vs. Barney 20 *Vt.*, 159.

The general principle that in the proper case examplary, punitive or vindictive damages may be given is well settled in this court.

Day vs. Woodworth, 13 *How*, 371.

Had the defendants neglected to levy the tax through ignorance of their duty, merely, the rule of damages would have been the amount of the judgment, interest and costs which it was their duty to levy the tax to pay; but by a willful and contemptuous disobedience to the

writ of *mandamus* which clearly prescribed the duty and commanded its performance, the defendants have forfeited the immunity which belongs to an officer acting in good faith, and subjected themselves to such additional damages as the jury may see fit to inflict as a lesson to teach the importance of official obedience to the law, when thus clearly expounded and brought to their knowledge by the process of the courts whose right and duty it is to give such instruction.

MATT H. CARPENTER,
Of Counsel for Plaintiff.

Stringer

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~264~~ 74

THE AETNA INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

WILLIAM HERRYFORD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MISSOURI.

FILED OCTOBER 5, 1869.

writ of *mandamus* which clearly prescribed the duty and commanded its performance, the defendants have forfeited the immunity which belongs to an officer acting in good faith, and subjected themselves to such additional damages as the jury may see fit to inflict as a lesson to teach the importance of official obedience to the law, when thus clearly expounded and brought to their knowledge by the process of the courts whose right and duty it is to give such instruction.

MATT H. CARPENTER,

Of Counsel for Plaintiff.